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# INFINITY IN A GRAIN OF SAND: THE WORLD OF LAW AND LAWYERING AS PORTRAYED IN THE CLINICAL TEACHING IMPLICIT IN THE LAW SCHOOL CURRICULUM

Howard Lesnick\*

## I. THE SETTING

I believe that law teachers systematically portray the world of law and lawyering to students in ways that, to a great extent, distort their own beliefs. This Essay explores that perceived dissonance, and describes one attempt to resolve it.

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My thoughts and understanding have benefited enormously from my association over six fruitful years with many faculty and student colleagues at the City University of New York Law School at Queens College. Of special salience was my intensive work with Professors John Farago, Jack Himmelstein, and Vanessa Merton (now Associate Dean and Director of Clinical Programs at Pace University School of Law) during the initial planning year (1982–83). I long ago lost the capacity to discern the boundaries between what I brought to our common enterprise and what I learned from them.

I am grateful, too, to Carrie Menkel-Meadow and the participants in the UCLA-Warwick Second International Conference on Clinical Legal Education, for their support and ideas, and to Jack Himmelstein and my University of Pennsylvania colleagues George Haskins, Stephen Morse, and Michael Schill for helpful responses to a draft of this essay.

I owe the title (but not, I hasten to confess, the subtitle) also to John Farago, and through him to William Blake, whose words deserve to be rendered unmodified:

To see a World in a Grain of Sand  
And a Heaven in a Wild Flower  
Hold Infinity in the palm of your hand  
And Eternity in an hour.

W. BLAKE, *Auguries of Innocence*, in WILLIAM BLAKE: POETRY AND DESIGNS 209 (M. Johnson & J. Grant eds. 1979).

My initial premise is that *all* law teaching is clinical teaching. By that, I mean that much of what we teach is taught implicitly, and even a course with an explicit agenda that is oriented to a field of substantive law inevitably will contain many implicit messages about what it means to be a lawyer.<sup>1</sup> The dichotomy between teaching about law and teaching about lawyering is porous, first, because the lawsuits that are the vehicle for studying substantive law contain many messages about lawyering and, second, because one's premises about law itself, even if implicit in the study of a legal subject, have powerful implications for the lawyer's role as well. The law of professional responsibility, for example, is to a significant degree shaped by conceptions of lawyering that have their ideological anchor in the underlying premises of contract law. The study of contracts, although ordinarily not addressing that connection explicitly, predisposes students to view the lawyer's work in ways that are consistent with the premises of contract law.

To some significant extent, the premise that in teaching law we also teach lawyering is today not controversial, condemned perhaps more as banal than as mistaken. I have in mind, however, more than the familiar litany of themes captured by the notion of "thinking like a lawyer:" awareness of, and the ability to use, the ambiguity of language, the elusiveness of facts, the subjectivity and ambivalent guidance of values, and the centrality of procedure and of the concepts of institutional competence and role. My contention is that what we are (predictably) taken to say about being a lawyer is far less measured and qualified than what we may mean to say. Intention is not the end of the matter, and the actual content of our teaching, I will suggest, goes a significant way beyond what many teachers would (rather proudly) acknowledge.

Several aspects of the educational experience, of which individual teachers tend to take insufficient account, affect the reach of that implicit teaching. The first is the differing way teachers and students apprehend legal education. Teachers tend to think of the student's experience, and the goals and methods of law school, as a three-year enterprise. Conscious as we must be of the ungraspable reach of the learning agenda, we tend to seek balance—within and among history, doctrine, theory, professional identity, and skill—

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1. The reference in the subtitle to the "clinical teaching" in a traditional curriculum is *not* therefore to the "clinics" and similar lawyering-focused programs now a fairly common portion of the traditional curriculum. I write here almost entirely of the "classroom," law-focused courses that make up virtually all of the early, and the bulk of the later, experience that students have of law school.

over the entire curriculum. Specifically, we tend to think of the first year more as a foundation for what is to follow than as a summary immersion in the whole. This tendency is a natural one, for we reside in the experience over time, as a faculty viewing it as a whole and as individuals teaching in various aspects of it from year to year.

The experience of students is quite different. Their immersion is both fuller and narrower, far more intensive and far less extensive. The intensity is at its height in the first year, particularly in the first semester; it is total (or near-total) for that one cycle, with no opportunity to revisit the earlier experience in the light of the latter. I believe that it is what is imprinted in that initial immersion, and not any broader message of the three years, that shapes students' consciousness of what is important and not important to being a lawyer. Any significant shift in the portrayal of law and lawyering in subsequent courses does not alter students' "map" of the legal world.<sup>2</sup> Rather, students judge that shift in light of what has gone before. What does not fit into the imprinted pattern students tend to cabin off and treat as peripheral, exceptional, or questionable.

If this perception is correct, we must say what we mean to say early on, as a full portion of the students' initial immersion in law study, for students will hear subsequent corrections, completions, and elaborations in ways that do not essentially alter the framework initially set forth, and will take supplementation of the initial message as more a comment on the supplementer than a modification of the message.

Moreover, the perceived content of an individual teacher's assertions is affected by the ubiquity of that message in the whole of a student's law school experience. For a teacher to emphasize only some aspects of the complex totality of a lawyer's function may not be in itself a serious distortion, but if each of a student's teachers makes a similar selection of attributes, the overall message will surely be that the omitted qualities are of no great importance. In short, a selectivity justified as a mere division of labor or function can operate as such only if what teachers omit in one part they supply in another. Yet that is seldom the case, especially in the crucial first year; in most students' experience, their teachers espouse roughly the same catalogue of lawyerly virtues.

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2. The term is Leonard Riskin's. See Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-46 (1982).



Finally, the implicit quality of the assertions augments their power: by not putting a question on the table for examination, while acting on the basis of an answer to it, a teacher in effect tells his or her students that acceptance of the answer is part of a proper definition of a lawyer. Controversy over the acceptability of the answer presumably is to be resolved prior to the decision to sign on to the law school enterprise; dissenters made (or were) an admissions error.

## II. THE IMPLICIT CURRICULUM

My hypothesis is that we can discern in legal education the assertion of a number of significant truths about lawyering and law; that much of the content of these assertions is not congruent with what many law teachers would avow; and that where the assertions are explicit or would be avowed, they are typically asserted as axioms, as "givens," rather than as the subject of exploration and choice. I cannot proffer a complete set of such assertions, and I recognize that there are discernible differences among teachers and schools. Nonetheless, I believe that a recognizable implicit curriculum is for the most part alive and well in the experience of the great majority of law students.<sup>3</sup>

To make this hypothesis more concrete, I examine three "case studies." They exemplify much, although certainly not all, of what I will catalogue as the content of the messages about being a lawyer that I see implicitly espoused in the law school curriculum. Recognizing that anecdotes can illustrate, but not document, a thesis, I

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3. I will focus only on the implicit messages of the explicit curriculum, that is, of the content of the courses. The idea of an implicit curriculum—the idea that much of what we teach about being a lawyer we transmit by the attitudes and practices that we model—goes much further, however, and applies to such areas of law school life as the admissions and placement processes, relations of faculty and students with the nonprofessional staff, and the bases on which we choose people to speak at school functions, receive awards, judge moot court, or have their pictures hung on our walls. It means little, for example, to talk about respect and concern for the disadvantaged as a social value if at the same time we reinforce by our conduct the widespread tendency to give people our attention, and our honors, on the basis of prestige, titles, and authority. Consider the criticisms of so mainstream a figure as former N.Y.U. Law School Dean and New York City Bar Association President Robert McKay:

Law schools measure their success in terms of the positions taken by their graduates—the larger the law firm, the more prestigious the practice; the higher the court for which a clerkship is secured, the more likely is the candidate to move on to successful corporate practice. There is nothing wrong with these goals; it is simply that one wonders if that is all there is to the profession.

McKay, *Beyond Professional Responsibility*, 10 *CAP. U.L. REV.* 709, 710 (1981).

invite the reader to consider whether that content resonates with his or her own sense of what is true.<sup>4</sup>

### A. *Three Case Studies*

Since we cannot all have shared a single classroom experience, I will look to the closest thing to it. I want too to make it clear that I am not speaking of "Kingsfieldism" or any supposed abuses of the system, but of what is mainstream, high-quality, core. On both accounts, I cannot begin in a better way than by looking to the *Harvard Law Review*. I will examine the discussion of the Supreme Court's decision in *NLRB v. Yeshiva University*<sup>5</sup> in the Supreme Court Note of November 1980.<sup>6</sup>

#### 1. *A Harvard Law Review Note*

The thesis of the Note is that the case was wrongly decided. In *Yeshiva*, the Supreme Court held that university professors at some universities are managerial employees excluded, albeit implicitly, from the protection of the National Labor Relations Act.<sup>7</sup> Essentially, the Note asserts that the Court made a mistake in harmonizing the legislative decisions to protect the self-organizational rights of professional, but not those of managerial, employees. The concluding sentence fully sums up the whole burden of the essay: "The Court should have adopted the analysis of the dissent."<sup>8</sup> All the Note says explicitly is that the case was wrongly decided. However, the implicit assertions are much broader and more fundamental.<sup>9</sup>

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4. In a luminous essay, White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1987), James Boyd White described the approach to which I am drawn:

I invite the reader to check what I say against what he or she knows . . . .  
Rather than making a case that is meant to stand or fall by the degree to which the unwilling are compelled to assent to it . . . I mean to present a set of reflections . . . to be tested against the reader's own.

*Id.* at 167. I believe that such an approach more fully enables fundamental questions to be opened up, rather than shut off, and is a necessary supplement to the prevailing approach, which not only values logical inference and empirical inquiry, but tends to view them as the exclusive bases of persuasiveness and academic respectability.

5. 444 U.S. 672 (1980).

6. *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 251-61 (1980).

7. *Yeshiva*, 444 U.S. 672.

8. Note, *supra* note 6, at 261.

9. I have chosen this Note in part because I agree with the position it takes. I regard the *Yeshiva University* decision as a dreadful example of conservative judicial activism. I can therefore use the Note as an example of something that concerns me without triggering the response that I am simply unhappy with the students' preferred result.

The Note asserts, first, that law, or at least adjudication, is a rational affair, a process of reasoning—that it is largely a technical matter: the legislature makes value judgments in enacting a statute, and the Court uses techniques or doctrines of institutional competence to decide cases under it.<sup>10</sup> The principles of statutory construction are one example; the principles of judicial review are another. The Note asserts that the Court erred in the purpose it attributed to the legislative action of including professionals and excluding managers.

Second, the Note says implicitly that to exercise one's critical judgment about a legal question (and of course that is what it is doing—these are not simply hacks telling you what the law is) means to engage in evaluation rather than explanation or understanding. The Note contains nothing to help anyone understand how it was that the Supreme Court made this mistake. One might speculate, but there is not a word that would explain the result. The real issues that would shape one's reaction to the underlying problem that gave rise to the litigation are never even set out, much less analyzed. It is not self-evident what the "real" issues are, but to me they have to do with one's view of the relationship between union and member, and between employer and employee, in particular, professional employee. That question is not connected to the explanation of the decision at all.

The implicit quality of the preceding statements gives them much unspoken content about the job of being a lawyer. First, we are all pretty much doing the same job. The judges, majority and dissent, the *Harvard Law Review* editors, the Harvard Law School labor law teachers, you and I, and perhaps even counsel (albeit counsel is committed to a result) are all engaged in bringing our intellectual powers to bear on reasoning a problem through to a solution.

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10. Legal education in many ways has long contained the implicit assertion that adjudication is by far the largest part of law, and nearly the only part worth thinking about. The *Harvard Law Review* has no annual "Congress Note." As Michael Fitts has observed:

For most of our history, the legislative process . . . has not been the focus of sustained legal scholarship. . . .

When the legal profession did scrutinize the internal mechanisms of the legislative process . . . [it] often viewed them somewhat in the manner of a common law judge reviewing the opinions in prior cases—rationalistic and public-regarding.

Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1564, 1569–71 (1988) (footnotes omitted).



I am not asserting that the preceding statements are incorrect, but that their accuracy is likely to be partial and in any event is not self-evident or axiomatic. Further, they are far more central to our thinking about law and learning law than questions that have to do with the harmonization of the managerial-professional dichotomy under the NLRA. To the extent that we do not make the correctness of those statements the explicit agenda, we are making the further assertion that a good lawyer does not question the view that law is rational, that the legislature makes the critical value judgments, that interpretation is a technical problem, and that the essential problem of criticism is to evaluate rather than to understand or explain.

The *Yeshiva* case—both the dispute out of which the litigation arose and the Supreme Court's treatment of the legal question—bristles with values conflicts regarding collective bargaining and unionization, the relation between employees and the union to which they belong, authority in the workplace, and the duty of loyalty assertedly owed to one's employer. By excluding all such questions from discussion, the Note silently (that is, loudly) asserts that our values, emotions, and concerns in these areas have nothing to do with our work as lawyers. Indeed, the implicit message is that such concerns too easily get in the way of good lawyering, and that the task of legal training is to facilitate the compartmentalization and repression of concerns over such matters in favor of what might be termed a "moot court" view of lawyering. Like the judges, the lawyers are all simply doing technical work, and a "good" legal job implicates such major matters as one's tangible conditions of employment and such minor matters as the length of one's commute to and from home. It is a simple further step to the presumption that the distribution or availability of legal services surely cannot be a serious problem, for it is almost a random event that a lawyer happens to represent one cause rather than another, one adversary rather than another.

I can view the implicit messages of the *Yeshiva* Note as broadly as I do only if I am correct in viewing it as neither simply an instance of flawed law review writing nor as atypical in its approach, only if one can find similar analyses of legal questions in the daily experience of law students affecting the treatment of upper-level, regulatory or lawyering courses as well as the classic first-year or "private law" core curriculum. I therefore turn to examine two additional case studies, one in the area of professional responsibility, a field presumably committed to examining issues of lawyers' roles,



and the other a problem in administrative law, a course that presumably complements any perceived narrowness in the first-year experience. I believe that each illustrates powerfully how difficult it is to leaven the implicit messages of law school.

## 2. A Forum on Professional Responsibility

Judge John Ferren, formerly a leading corporate and public-interest lawyer, presented a hypothetical problem to a forum on professional responsibility problems of the corporate lawyer.<sup>11</sup> Briefly, the situation is this: you are outside counsel to an aircraft manufacturer, Trireme Aluminum Company. The chief engineer of the company—someone you have known as a friend over the years—tells you in confidence that he is very disturbed about the safety of a new alloy being used in a new plane. The alloy passed all safety tests, but the engineer fears the tests do not sufficiently screen for the unusually high altitude, and accompanying extreme cold and extreme low pressure, that will characterize the plane in use. He tells you that some of his staff share his fears and some do not, and concludes: "Whatever you do, don't use my name."

The problem postulates that you go to the company president, whom you know fairly well, and ask (in a way that does not identify the engineer as your source) whether there is a problem with the new alloy. The president rather shortly says that a couple of people in the engineering department were worried, but that he looked into it and learned that most of the engineers say it is perfectly all right. (The president's statement is in fact true.) You are hesitant to drop the point, but the president gets very upset when you persist. We can imagine that his response proceeds something like this: "Look, this development has turned us around; we were a failing company, as you well know, and now we are marketing this plane. It is a fine plane, there's no problem, and starting rumors will destroy the company; we will all be out on the street, and the whole city will hate us, if we recall this plane. So just forget it." He is quite upset.

The problem first asks whether you may, or must, bring this issue to the board of directors. Next, the problem hypothesizes that you do raise the issue at the board level. The president states that he has looked into this question, that a couple of people think there may be a safety problem but most do not, and that he thinks there is no problem. The chairman of the board thanks you for your inter-

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11. See Ferren, *The Corporate Lawyer's Obligation to the Public Interest*, 33 BUS. LAW. 1253, 1253-54 (1978).

est, notes that lawyers traditionally are worriers, and says that while it is useful to have people play that role, Harry over here is the president because we trust him, and we can regard the matter as now closed. He turns to the next agendum.

Of course, the next thing that happens is that a plane crashes, killing a number of people. The Federal Aviation Administration issues a directive, which, in effect, grounds the new plane pending an investigation, and serves the company with a subpoena demanding production of certain records. The company asks you to stop the investigation. You can file a motion asserting that, under the applicable substantive law, there is an inadequate basis for the directive and asking to have it stayed. You can file a second motion asserting that unless there is a valid pending proceeding the subpoena has no legal basis, and seeking to quash the subpoena unless and until the court rules against Trireme on your first motion. The result of success in this double-barrelled attack would be to get the planes flying again, while hindering an investigation of the cause of the crash.

The problem goes on to analyze your obligations. I am not interested in the substance of the issue, but in the way the presentation considers it. The questions discussed are these: (1) is withdrawal as counsel at any one of the steps described permissible under DR 2-110(C) of the Model Code of Professional Responsibility?<sup>12</sup> (2) if you do withdraw, may you (in light of applicable Bar Association opinions) tell your successor—to whom the chief engineer would certainly not say anything—what you know?; and (3) what are your obligations under DR 7-102 vis-a-vis the investigation that is going on on behalf of the public? DR 7-102(B)(1) provides that, if a lawyer learns that it has been clearly established that a client has perpetrated a fraud on a person or tribunal, disclosure is compulsory unless the information was privileged.<sup>13</sup> The presentation discusses whether fraud has been established, and whether clearly so or not, and then whether a person or tribunal has been the victim: does “a person” mean an individual, or may it extend to society at large? Is an agency a “tribunal” when it is acting in an investigative rather than an adjudicative capacity, or may it now be

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12. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1980) (enumerating situations in which an attorney is permitted to withdraw). The problem was published prior to the appearance of the Model Rules on the scene. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1983) (permissive withdrawal in the context of organization violations of the law); see also *id.* Rule 1.16(b) (permissive withdrawal generally).

13. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1980).

viewed more as an adversary than a court? Finally, is this a case of privileged communication?

The discussion concludes by observing that the problem is probably an unreal one, for no such extreme case has actually arisen. There is an explicit assertion that, if this situation did occur, it would have become clear to everyone early on that disclosure was inevitable; and the real solution to a dilemma like this (which is a real dilemma in other cases) is an early, credible threat of withdrawal by the attorney. If the Bar would be clearer with clients as to the conditions under which its members will withdraw from representation, it would be relatively easy to keep clients in line.

Again, the point of reflecting on this problem is not to say that any of its explicit assertions are wrong. If we were to look at this problem, not for the answers it gives to a hypothetical professional responsibility problem, but to observe the way that lawyers see the problem, what would we observe?

First, ethical problems are treated as legal issues. The questions are whether a certain action constitutes fraud, whether the FAA constitutes a tribunal, whether the statement is a privileged communication, and whether withdrawal would prejudice the client. There is no discussion of why that is so. It seems self-evident. But we are talking about an unusual source of law. The ABA Model Code of Professional Responsibility is something between the Ten Commandments and a press release. The American Bar Association is a private organization, and its pronouncements have no legal force. Of course, in one form or another the Code is—or was—law in the sense that the Supreme Court of every state promulgated it. But if you ask why we have to follow it, the going gets a bit slippery. One answer is that one who violates the Code may get into trouble. Some discussions say that explicitly: would you be “in trouble” considering the language of DR “X” or in light of ABA Opinion “Y”, if you did this? The accurate answer is that you very likely will not be in trouble no matter what you do. Very few lawyers are disciplined, and especially not in mind-boggling, agonizing matters like the *Trireme* problem. You really do not have to worry on that account.<sup>14</sup>

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14. Recent years have seen a partial erosion of attorney insulation from the risk of discipline in a case such as *Trireme*, although the “discipline” is more likely, in my observation, to take the form of litigation asserting the attorney’s liability to a person injured by a breach of professional ethics than the form of a disciplinary proceeding. I do not think that this trend has yet progressed far enough to explain the phenomenon discussed in the text, which long antedated it in any event.



Perhaps, of course, the point refers to the moral basis of the Code. There was a time when many lawyers viewed the Code as something like the Ten Commandments<sup>15</sup> but I doubt many lawyers believe that today. Richard Abel has observed that the change in names—from Canons of Ethics to Code of Responsibility to Rules of Conduct—expresses “a progressive decline in normativity.”<sup>16</sup> One of the by-products of the controversy over the drafting and adoption of the Model Rules is that both the Code and the Rules are now even more than before viewed not as a body of moral norms, but simply as positive law, and as open to criticism, avoidance, or evasion as any other act of a lawmaking body.

Nevertheless, the Trireme problem assumes that ethical issues are answerable in legal terms. And this view, it should be noted, applies to both the high side and the low side: if “whistle-blowing” (or other action inconsistent with a client’s wishes or interests) is required by the Code, a lawyer must blow the whistle, and if it is not required by the Code, he or she may not, because the duty of loyalty fills all the rest of the space. In Orwellian terms, everything is either forbidden or compulsory. In this environment, problems of ethics or responsibility—what action do I choose to take, or feel called upon to take?—come to be viewed as problems of advocacy: what actions can I justify as permissible or, better yet, obligatory?<sup>17</sup>

Second, as the process of legal analysis continues, it acquires accelerating complexity. A relatively simple problem—not simple in its solution, but simple factually—becomes a multi-layered law review article. There are six crucial words of the Code needing construction; there are several Bar Association Opinions needing rec-

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15. A lawyer once said that to me explicitly, with reference to the 1974 ABA amendment regarding group legal services (one of the controversial and short-lived “Houston” amendments). When I responded that it has never been reported that the Ten Commandments were amended by a vote of 140 to 117, he shrugged; he viewed the Code as per se morally authoritative.

16. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 686 n.257 (1981).

17. One consequence, in the context of this problem, of the focus on legal answers to ethical questions seems especially bizarre. Great attention is paid to the questions of disclosure and withdrawal, but none to the fact that the attorney is asked to move from passively aiding or protecting the company by silence, to actively seeking to keep the planes flying by filing motions designed to fend off the FAA. The explanation for this priority, I believe, is nothing more than the fact that filing motions is thought to raise ethical problems only when they are substantively groundless. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). I cannot imagine that anyone other than a lawyer would perceive this phenomenon as anything but grievously astigmatic. See *infra* text accompanying note 18.



conciliation. By the time one is finished, a sense of bewilderment interacts with the fact that the problem is viewed as a legal rather than an ethical problem, so that a decision to do nothing seems comfortable. After all, what does one do after reading ten pages of dense legal analysis about a moral problem? One says, "Well, that's a hard question and who knows what is right," and goes on to something else, not having engaged with the broader dimensions of the problem and channeled toward a response that avoids the need to do so.

Seeing the question as a legal issue, and multiplying the complexity and subtlety of the legal issues, removes from thought the real question, and the omission from the discussion of any consideration of the moral dimensions of the question nails down the removal. Again, what the "real" question is may not be self-evident. To me, it is this: what do you do if you, an autonomous professional genuinely concerned about the danger but recognizing that you do not really know how substantial it is, are told by this powerful, successful, fairly aggressive person whom you represent, not to worry about it? You are reluctant to drop the matter because you are afraid that the company president may not really be open to hearing the problem, and part of your job, as well as your responsibility to yourself, is to worry. On the other hand, he is intimidating you and might fire you or lose confidence in you. More than that, you respect him: he knows more about this matter than you do, and if you have been representing him, you probably think that he is doing an admirable job under dreadful circumstances. When the president tells you not to worry about it, that he knows all about it, and has decided everything is all right, it is not just lust for a fee that keeps you quiet. Your tendency to remain silent is reinforced (if you have any sense) by some humility about whether he may be right. Trust me, he says, and says it with a smile and with a fist. And both of them are effective.

That to me is the real problem, and an extremely agonizing problem it is, of being a lawyer: how do you keep your self-respect as a lawyer in that circumstance? The problem is transformed from a painful to a stimulating one by viewing it as a series of legal complexities. By the time the panelists finish analyzing all the issues, everyone is ready to shake hands all around, say that this has been a very useful discussion—no one could possibly remember which Code provision he or she thinks has been the crucial one—and go off thinking: "Well, I'll just pick up the next matter in my 'in' box and go on with my work." The intellectual challenges of wrestling

with a hard problem in professional responsibility provide a cathartic release from the grip of the problem as it would otherwise be experienced.

Finally, the conclusion of the article—that this is an extreme case not likely to occur—legitimizes the attitude that we really do not have to worry too much about this kind of problem. It does not get out of hand; only borderline, defensible issues come up, and it is in everyone's interest, clients and lawyers, to do the right thing.

Thus, the analysis both illustrates the way, and reinforces the process by which, our selves become removed from the legal problems we work on as lawyers. Personal conflicts—whether over conflicts between loyalty to client interest and concern over public harms, or the conflict between one's self-image as an independent professional and the power imbalance vis-a-vis the company president—are abstracted from the activity of lawyering.

Indeed, the message is not only that this does happen, but that it needs to happen. Only in that way can we live with the tension. For I think it is clear that the unspoken messages of the *Trireme* discussion come through much more loudly to students than the question of what constitutes a "tribunal" within the meaning of DR 7-102(B). And the final assertion that is made is that a good lawyer thinks and acts as all the other unexpressed assertions prescribe: a good lawyer treats ethical problems as legal ones, attuned fully to their accelerating complexity; a good lawyer does not talk about or focus attention on the dilemma of how to deal with powerful clients and maintain a sense of independence and integrity; and a good lawyer believes that the problem does not get out of hand, that it is manageable.

### 3. An Administrative Law Problem

A friend has begun his administrative law course with this problem: assume that a newspaper has written a major exposé about the overuse of tranquilizing drugs in prisons. The article describes extensive use of such drugs in cases where no real judgment has been made that there is mental disturbance, including instances of routine or punitive administration by guards and other unlicensed personnel. After a public furor, a quick scheduling of legislative hearings, and a rush to posture before the media, the legislature passes a law to stop this outrage. The statute is one sentence long: "In order to protect the health of prisoners and the interests of society, the Commissioner of Corrections shall promulgate and enforce rules to regulate the improper use of drugs in prisons."

The problem posed to the class is twofold. First, how should the Commissioner of Corrections go about deciding what to do? Second, what should the Commissioner decide?

The first issue raises the question how an agency informs itself prior to making decisions: should the Commissioner sit in his or her office and think, read articles, seek the advice of a knowledgeable friend or consultant, rely on the knowledge and priorities of the staff, hold a hearing? In legal terms, the case study raises issues regarding legislative rule-making, the right to a hearing, and the form of a hearing. If there is to be a hearing, should the agency publish a notice in the newspaper, should it write letters inviting interested parties or groups to appear, should it let people appear in person, should there be witnesses, should it make a record, should it give participants the right of confrontation and cross-examination?

The second issue goes to the substance of the decision: the problem assumes that the Commissioner does hold a hearing, and asks or permits several organizations, such as the guards' union, the ACLU, the drug companies, to make submissions. Students are to play different roles, preparing testimony to be offered at the hearing. The issues to some degree arise out of the parties' submissions: should there be a requirement that drugs be administered only with consent? Should there be a requirement that they be administered only with the approval of a physician, a psychiatrist, or a panel of physicians? Should their use be limited in time, or should the size of the population receiving drugs be limited? Should there be substantive safeguards, or other sorts of restrictions?

This is a sophisticated problem, well calculated to teach much valuable administrative law matter, and nothing that follows denies that. However, the problem also teaches, implicitly, a lot about law and lawyering, and their interaction, that needs to be addressed explicitly. If we look at the story as a series of events and not as a series of legal problems to be debated, it contains, first, an excellent illustration of a contradiction basic to the legal process. The newspaper and legislative furor illustrates the very real and significant commitment to basic human values—specifically, individual dignity, autonomy, and privacy—that is part of law. Widespread publication of a story like this affronts a widely held value that has genuine force. The legislature feels that it must act. It cannot simply say, "To hell with them, they're a bunch of junkies and cons anyway." And so it acts.

At the same time, the legislature cannot do anything about the problem. By that, I mean that the legislature cannot do anything

about it without also affronting other values that it cares about. One is simply the reluctance to spend money; another is an authoritarian, punitive concept of penology, which is inconsistent with a desire to do much about the problem; and a third is an expertise-oriented approach to professionalism in the medical area, and the use of medication, that the legislature has no interest in examining.

The legislature delegates the problem to an administrator and declares it solved: we have taken care of this problem by assigning it to this excellent person, whose job it is to do something about it. The administrative process in this scenario plays the function of legitimating the claim that the legislature has "done something." Obviously, if all the legislature did was to pass a law saying that a prestigious local law school should study the problem and publish an article discussing it, people would find this action a bit irresponsible. But the administrative process legitimates delegation by making it credible to say that its outcome provides a solution. It does this in part by providing a hearing that is regarded as fair. The hearing therefore must be fair enough to make that claim credible. If the Commissioner simply said "this is what I think," and published some regulations, there would be an outcry that he did not listen to knowledgeable or interested parties. The outcry would be fueled by objections to the result, but lent credence by the illegitimacy of the process.

At the same time, we know that no matter what happens, no matter how the hearing goes, no matter what the rules say, no matter what procedures are followed, the prisoners will not get physicians who will protect them from unwarranted use of medication. When the prisoners were out "in life" they did not have such doctors, and they will certainly not have them now. We know that this rural prison of a thousand people is not going to have a staff of psychiatrists overseeing a drug problem. We know that in *any* large building you might name—probably not excluding the one in which these words are being read—the use of medication is woefully excessive. Of course it is usually taken on a voluntary basis, but what we mean by "voluntary" is rather subtle; what we mean is that the level and kind of influences are regarded as acceptable. We label as "coercion" that which is not acceptable. Some "voluntary" drug users are "influenced" by their doctors, some by their families, some by their employers, and some by their perception of the alternatives.

Studying the problem in a classroom environment mirrors the political reality. Taking the problem seriously validates the commitment of the law to individual dignity and autonomy; yet the is-



sues raised—the kind of hearing, the range of arguments, issues of judicial review and substantial evidence—all assure that no matter what happens, not much is going to change. The well-trained legal mind is one that does not rebel against this fact. In contrast, a lay person (for example, a professional from another profession, or a first-year student still open to the charge of being a “mushhead”) will often respond to a problem like this one by raising questions such as: why are so many people in prison; why are prisons several hundred miles away from the prisoners’ homes; why are the drugs there in the first place; why are drugs so readily available to people generally? Our immediate reaction to each of these questions is to say: “Hold on, none of them is relevant. We are not talking about sentencing policy. You may think that there should not be prisons with a thousand people in them, or that there should be community treatment centers. We are not talking about that. You may think that people should not have access to drugs just because they want them, so you do not like prisoner consent as a safeguard. We are not talking about that. You may think that urban blacks should not be imprisoned in a locality that insures that their guards will be mostly rural whites; you think that guards should be blacks from the prisoners’ own community, and who do not have clubs and the like. We are not talking about that either.”

That is what we teach, and that is what we are supposed to teach: focus on the issue at hand, strip away what is not in question, not open to question, or not obtainable in this forum. That method has unquestioned value as a mind-training device. It also has the broader effect of making the problem unsolvable. I do not mean that it was solvable before. The problem is unsolvable because the only way it can be solved is by changing a whole series of “givens” regarding prisons, drugs, and the physician-patient relation in ways that our society is not willing to do. The “professional” approach to lawyering makes the input of the legal process and of lawyers accommodate itself to that unsolvability. So, if you represent the ACLU, you write a first-rate brief that begins by giving up (by failing even to ask for) six or eight important civil liberties goals because you know that you cannot get them. You do not ask a court, for example, to shut the prison down and open three smaller ones nearer the prisoners’ homes. You do not attack the Commissioner as closed-minded or lacking in requisite independence because he or she is a former district attorney, police officer, or parole officer. The list of “unthinkable” objectives can go on.

In teaching this problem as an administrative law problem, we reinforce the message that the job of a lawyer is to achieve the best result available within the limits presented. To be sure, the lawyer's job is to look skeptically at what are asserted to be the limits, and to press against them to the extent it seems productive to do so, but then to accept what is given and work toward the best you can get within those limits. The limits themselves are not your problem, and should not be made your problem. If you cannot live with that—and sometimes you may not be able to—do not appear in the case. Write an article for a magazine about prisons, become a warden, run for the legislature, but do not work as a lawyer.

Embedded in that prescription is the premise that a half-loaf is better than none, that a quarter-loaf is better than none, that an eighth-loaf is better than none. Being a good lawyer is accepting reality, and getting what you can within it, instead of antagonizing everybody and getting nothing. This comes up very clearly in the work of lawyers who represent poor people, political dissidents, or others who do not trust the prevailing social order or share its premises. And by keeping the assertions regarding lawyers' function implied (or axiomatic), the traditional message fails to perceive the presence of an issue of client autonomy and professional dominance. Should the lawyer, or the client, make decisions regarding goals and tactics? The lawyer who defines the questions of his or her client's values, with respect to objectives, as "getting something rather than nothing" is making a decision by seeing no decision to be made. We should not assume that a client participating in a legal proceeding wants to "win" the legal proceeding no matter how limited a victory is open to realistic hope, or no matter what "transaction costs" may have to be paid (by the client, not the lawyer). That may not be true at all.

#### B. *The Perceived Messages of the Law School Curriculum*

I want now to draw on the three case studies, and on other observations, to illustrate briefly the messages about being a lawyer that the law school curriculum implicitly espouses.

##### 1. Legal Subjects Develop in Significant Isolation from One Another, and Have a Substantial Coherence as "Fields"

To say that this proposition is generally asserted in our teaching is not to ignore the marked increase in recent years in the sophistication of law teachers with respect to their recognition that legal subjects—property, torts, and contracts, for example—fold in

on one another unceasingly. But I am concerned now with the construction and execution of courses rather than with the themes of contemporary scholarship. In introductory classes or casebook chapters, and in periodic moments of rediscovery during the semester, the seamlessness of the web is recognized. But that acknowledgement is muted in the student's experience by the firmly stitched seams of the casebooks, and by crowded syllabi that are thought to leave space for only an occasional reference to a course whose boundary has just been crossed or drawn in question—a reference triggering the hope (known to be vain) that the “other” teacher will attend to the frontier surrounding the boundary.

The compartmentalization of students' thinking is reinforced by the use of *traditional* categories to divide teaching responsibilities. A division that looks arbitrary, unaccustomed, or controversial will raise questions that a familiar division will leave unstirred or will turn aside. Indeed, given the focus on appellate opinions as the basis for studying law, we would gain much by simply teaching a single volume of the law reports for a semester. (What would the Association of American Law Schools Directory do with a course entitled “274 A.2d”?) Students then would be forced to learn for themselves the reasons for the familiar categories, in ways that would not reflexively turn aside attention to the limits of those reasons.

The substantive effect of compartmentalization is striking. In the Trireme problem, for example, thinking of the issues as ones of “professional responsibility” (and therefore not, *inter alia*, “procedure”) facilitates an approach that sees ethical questions in an attorney's silence, but not in an attorney's moving to quash a subpoena. Studying procedure as a field of substantive law (and not one which supplies a context for the study of professional responsibility) facilitates an approach to the ethics of filing motions that focusses narrowly on questions like frivolousness, delay, and Rule 11 sanctions.<sup>18</sup> The result is that in neither course would any notice be taken of the ethical significance of filing the motion to quash, by which the lawyer moves from a passive to an active role in enabling the company to continue carrying on an extremely hazardous activity.

Even more far reaching is the way that the habit of compartmentalization channels one's thinking about fundamental questions of lawyering. Learning the skill of focusing one's attention by nar-

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18. See, e.g., FED. R. CIV. P. 11 (requiring sanctions for frivolous motions).

rowing it too often brings with it the ready acceptance of role-defined morality and exaggerated forms of moral skepticism and relativism.<sup>19</sup>

2. The Core of Law is Private Law, that Is, Governmental Facilitation of Private Ordering; Regulation is a Latter-Day Set of Exceptions

Here, too, recent changes have wrought less change than one might assume. Certainly, common-law development is now often explicitly regulatory in its impulse, and the traditional "common-law" subjects are pervaded by statutory, even constitutional, inputs, which are only in part codifications of the common law. Yet the fundamental points of departure, ideologically no less than historically, remain: in contracts, the necessity and sufficiency of assent; in torts, the requirements of fault and causation; in property, the corollaries of the power to exclude; in civil procedure, the judicial system as passive adjudicator of disputes brought into the process through private decision-making. If I may use my own words—not as authority, but to avoid unacknowledged repetition—what is observable with respect to labor law, traditionally thought of as an upper-year "regulatory" course, is a fortiori so in the first year:

[T]he changes that have occurred are ideologically peripheral. The periphery may be extremely complex and significant, but it is nonetheless comprised of exceptions, each of which needs to be justified as a departure from the norm. Moreover, neither a particular regulatory program, nor its totality, is seen as embodying a fundamental rejection of freedom of contract as a primary social value. To the contrary, each regulatory program is explicitly required to be construed to respect the principle of freedom of contract as much as possible.<sup>20</sup>

We can see the power of this premise in each of the three case studies. The governing maxim is that people with power exercise it as they wish, free of the need to account to others, unless they have violated some applicable rule. A company refuses to recognize a union chosen to represent its workers; a lawyer chooses to prefer his client's interests over those of "the public;" a warden manages a

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19. "Legal argument has a narrowing and focusing nature and when issues are put beyond the scope of what is legally relevant . . . it does not seem fruitful to put class time into them. From accepting their irrelevance to the argument, we often move imperceptibly to thinking them irrelevant altogether." E. DVORKIN, J. HIMMELSTEIN & H. LESNICK, *BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM* 2 (1981).

20. Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 *BUFFALO L. REV.* 833, 845-46 (1983).



prison through widespread use of medication. In each case, determining whether power and discretion have been "abused" means examining whether legal restraints on discretion have been observed and responding to the perception of abuse in ways that intrude as lightly as possible on pre-existing allocations of power and discretion.

3. The Core Skill of Lawyering Is Incisive Analytic Reasoning; It Is Largely this Ingredient that Determines the Quality of Legal Representation and Accounts for the Quality of Judicial and Administrative Decisions

Law schools emphasize "legal reasoning" for good reasons. It is difficult and challenging; it is in many ways the prerequisite of deeper and broader thinking; premature or excessive skepticism about its relevance to decision-making can sap the motivation to master its challenges; students can study it in the large-class, casebook-based format that the economics of legal education appears to require. But even though a ballplayer cannot succeed without learning to hit, if a school of baseball taught only hitting until neophytes succeeded at it, and left base running and fielding for "later life," it would produce all too many competent hitters who are not only disastrous in the field, but who are too often forced out or picked off. Put at its simplest, recognizing the necessity of intellectual power to good lawyering or judging is a long way from conceding its sufficiency. Yet by dwelling for the most part on analytic rigor, law schools tend to conflate the two in students' consciousness.<sup>21</sup>

Law study systematically exaggerates the importance of the merits, the existence of a cause of action or defense, and systematically pays insufficient attention to other inputs to the quality of representation, such as the availability and quality of counsel and other litigation resources, and to the vagaries of marshalling and presenting a case, let alone to "nonlegal" factors affecting the perceptions

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21. The emphasis on the intelligence or analytic prowess of judges or judicial nominees is illustrative. How often is it deemed somewhat inappropriate to criticize the work product of a judge or justice who can be defended as "really sharp"? That Daniel Manion may have been thought disqualified to be a judge simply by reason of assertedly sub-marginal analytic skills, *see Senate Casts 50-49 for Manion: Controversial Choice for Appellate Court Wins Confirmation*, Wash. Post, July 24, 1986, at A1, does not establish that some others are qualified to be judges simply by reason of assertedly outstanding analytic skills or impressive law school academic records.

of judges, jurors, and witnesses.<sup>22</sup> This pattern suggests to students that these factors do not merit serious thought by first-rate minds, whether in considering questions of public policy or in practicing law.

In addition to exaggerating the salience of reasoning and “the merits,” legal education tends to focus on a narrow form of reasoning. Analytic reasoning responds to the felt impossibility of thinking about “everything” in a disciplined way. It is sufficiently challenging that students eagerly adopt the pattern of putting aside context. When the process is not sufficiently explicit, however, the “putting aside” becomes more than a heuristic device. Compare the observations of the noted comparativist, René David:

English law was born of procedure, a fact which has implications not only for the technical form of the law but for legal philosophy as well. English law excels in the consideration of concrete problems and in the discovery and application of practical formulae. It shows a distrust for broad principles and overly abstract generalizations. . . . English law is not an educating or moralizing law, but an esoteric, technicians’ law. . . . Whatever is unrelated to litigation . . . does not concern jurists.<sup>23</sup>

Moreover, as the *Yeshiva* Note illustrates, the emphasis is on the use of reasoning to evaluate, rather than to understand or explain. The result is a narrowly analytic approach to reasoning that can quickly become disembodied from context. The extent to which a particular consciousness, emphasizing analysis over context, exists may be understood by considering a polar consciousness, given voice by the Vietnamese monk, Thich Nhat Hanh:

Just as a piece of paper is the fruit, the combination of many elements that can be called non-paper elements, the individual is made of non-individual elements. If you are a poet, you will see clearly that there is a cloud floating in this sheet of paper. Without a cloud there will be no water; without water, the trees cannot grow; and without trees, you cannot make paper. So the cloud is in here. The existence of this page is dependent on the existence of a cloud. . . . [Because the forest cannot grow without sunshine] you can see sunshine in this sheet of paper. And if you

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22. Consider the observations of the incumbent Chief Justice of the United States: “[L]aw schools should concern themselves, perhaps more than they have in the past, with the structure of the practicing bar.” Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 157 (1987); see also Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 322 (1989) (“Law teachers almost obsessively study the results of formal legal disputes but pay almost no attention to how disputes emerge and transform and to how professional lawyering affects these emergences and transformations.”).

23. R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY* 73 (M. Kindred trans. 1972) (footnote omitted).

look more deeply . . . with the eyes of those who are awake, you see not only the cloud and the sunshine in it, but that everything is here: the wheat that became the bread for the logger to eat, the logger's father—everything is in this sheet of paper.<sup>24</sup>

#### 4. Litigation Is the Most Significant Means of Processing Disputes

Casebook introductions abound with perspective about the extraordinariness of litigation,<sup>25</sup> reflecting (albeit palely) the recent explosion of scholarship about the pervasiveness of far less assertive responses to felt injustice. Yet the fact remains that the near-total attention of students is focused on litigated cases—indeed, on those disputes pursued to a decision on appeal. Beyond that, we do not study the system of litigation so much as we examine the merits of disputes, including disputes about procedure, successfully brought through the system. Else, we would emphasize far more than we do the availability of interim remedies (bail, preliminary injunctions, stays pending appeal); the effects of the structure of the market for legal representation, of other costs of suit, of delay, and of calendar and settlement practices; the law of justiciability and of parties; and the efficacy of post-judgment remedies—in short, we would emphasize the *institution* of adjudication.

The *Yeshiva* Note manifests the emphasis on doctrinal correctness; “Trireme” and the administrative law problem emphasize the strength of the tendency to collapse issues of judgment, responsibility, and values into questions of law. By emphasizing the correctness or doctrinal effect of the answers that litigated cases give to questions of legal regulation, we overstate enormously the capacity of litigation to answer such questions in a manner responsive to the needs of the litigants, and encourage students to take for granted the desire and the capacity of “the parties”—who of course were simply “people” until a complaint was filed—to obtain an adjudicatory answer.

#### 5. The Lawyer's Task Is to Make Arguments or Shape Transactions on Behalf of the Instrumental Objectives, Usually the Financial or Autonomy Objectives, of His or Her Client

Several years ago, a first-year criminal procedure teacher at a leading law school, after posing a hypothetical question seeking to

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24. T. NHAT HANH, BEING PEACE 45–46 (1987).

25. E.g., R. COVER, O. FISS & J. RESNIK, PROCEDURE 1–2 (1988).

probe the contours of a recent fourth amendment decision, asked, "If you were the Assistant District Attorney, what would you argue on these facts in opposition to a motion to suppress?" The student answered, "If I were the A.D.A. in that case, I wouldn't oppose the motion to suppress." The teacher replied, "You don't belong in law school," and called on someone else.

So crudely explicit an incident may well be fairly rare, and may be put aside as an "abuse." Yet what was articulated there is implicit in the everyday work of law school: the emphasis on decisions in litigated cases, which constantly portray counsel in settings where the decision has been made to pursue claims of legal right through judgment (and beyond); the trivialization of "professional responsibility" issues, not only by their conspicuous absence from genuine engagement in the early months of law study, but by the tendency, as in "Trireme," to limit responsibility to the effect of fraud, perjury, or illegality; and the "moot court" syndrome, which identifies brief-writing and oral advocacy as the premier skill of lawyering, to the exclusion, for example, of the ability to discern accurately the actual (rather than the attributed) goals and priorities of a client.<sup>26</sup> Richard Wasserstrom suggests that aspects of legal education like these imply a conception of "good lawyers" as

persons . . . who can and will bring skills and knowledge . . . regularly and fully to bear upon any matter of concern to any client willing and able to employ them in order to further the client's interest, provided only that they, as lawyers, do not do what the law prohibits lawyers from doing for clients.<sup>27</sup>

Again, it is a polar experience that can make us aware of the implicit assumptions of most law school discussions of disputes. Consider this arresting experience recounted by Kenney Hegland:

In my first-year contracts class, I wished to review various doctrines we had recently studied. I put the following:

In a long term installment contract, seller promises buyer to deliver widgets at the rate of 1,000 a month. The first two deliveries are perfect. However, in the third month seller delivers only 990 widgets. Buyer becomes so incensed that he rejects deliveries and refuses to pay for widgets already delivered.

After stating the problem, I asked, "If you were seller, what would you say?" What I was looking for was a discussion of the

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26. Law students would, for example, learn a far more textured lesson about the work of a lawyer if they spent a portion of their first semester carefully studying Warren Lehman's insightful essay, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

27. Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155, 156 (1984).



various common law theories which would force the buyer to pay for the widgets delivered and those which would throw buyer into breach for cancelling the remaining deliveries. . . .

After asking the question, I looked around the room for a volunteer. . . . [An eight year old son of one of my students] raised his hand. . . .

"OK," I said, "What would you say if you were the seller?"

"I'd say, 'I'm sorry.'" <sup>28</sup>

6. Little that a Student Did or Knew Prior to Beginning Law Study Is Very Helpful or Relevant to the Task of Learning to Be a Good Lawyer

That aspect of the "boot camp" psychology which views the entering class as needing to learn to put aside (at least for a time) the mush it has learned in college has survived the substantial demise of the menacing style of professorial dialogue. Even though the past twenty-five years has seen an acceleration in "the decline of law as an autonomous discipline," <sup>29</sup> legal reasoning still tends to be taught, especially to first-year students, as a realm of thought relatively insulated from others. Moreover, while the relevance of graduate study in other fields is now acknowledged as a valuable source of understanding, teachers rarely bring other aspects of the prior work and life experience of law students (more and more of whom are well past their early twenties) into classroom consideration of legal questions in any truly hospitable way.

The exclusion is not merely of a student's personal history, such as prior work or study; it carries over to treatment of the relevance of a student's larger sense of self, of purpose in seeking to become a lawyer, of his or her impulse to seek understanding. Indeed, the heavy emphasis on an instrumental valuing of knowledge and skills discourages the search—which many intellectually able law students would welcome—for a broader knowledge than is "needed" for the particular task at hand, and thereby impoverishes even the search for knowledge and skills, lending law study the seemingly nonintellectual quality that other academically oriented

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28. Hegland, *Why Teach Trial Advocacy?: An Essay on "Never Ask Why,"* in *ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING* 68, 69 (J. Himmelstein & H. Lesnick eds. 1981). For a slightly different version of this incident, see K. HEGLAND, *INTRODUCTION TO THE STUDY AND PRACTICE OF LAW IN A NUTSHELL* 283–84 (1984).

29. See Posner, *The Decline of Law as an Autonomous Discipline: 1962–87*, 100 *HARV. L. REV.* 761, 761 (1987).

people often find in it.<sup>30</sup> The narrowness of the contextual discussion in the *Yeshiva* Note, for example, probably has its source in the overly unalloyed valuing of conciseness, a sharp definition of "the issues," and a quickness to draw a circle of relevance to an issue.

One effect of this "privileging" of education obtained only after enrollment in law school is to reinforce a parallel approach to the lawyer-client relation, which powerfully legitimates professional dominance. Gerald Lopez has observed how the tendency to incorporate "little of everyday life" into the educational program makes it likely that "future lawyers will continue to believe that they do their best work only and always at a distance from and without a deep appreciation for those with whom they work."<sup>31</sup>

### C. *The Infirmary in the Implicit Curriculum*

This catalogue of implicit messages could of course be refined through amendment or addition<sup>32</sup> and, as starkly stated here, is probably overdrawn in several respects. Most teachers probably devote significant energy to conveying a somewhat broader message with respect to one or more ingredients.<sup>33</sup> I believe that nonetheless the overall message of the curriculum is barely affected by such efforts, and that generation after generation of law students has attested—some happily, some with hostility or self-doubt—to the accuracy of my hypothesis.<sup>34</sup>

I believe, as I have said, that many law teachers would not avow the implicit messages that I have here sought to describe. I base that conclusion on conversations with a great many law teachers, of widely varying outlooks on legal education, over the years. Perhaps the only "objective" evidence that I can marshall in support of my belief is the widespread disenchantment among the professoriate with the world-view and work product of its former students. Again, I invite you to measure the truth of what I say against your own experience of your colleagues.

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30. "[T]he law school belongs in the modern university no more than a school of fencing or dancing." T. VELEN, *THE HIGHER LEARNING IN AMERICA* 155 (1957).

31. Lopez, *supra* note 22, at 340; see *id.* at 353–54.

32. For a somewhat different array, see *id.* at 308–58.

33. Recall that it is part of my thesis that many, perhaps most, law teachers' own beliefs are closer to such a "broader message".

34. In a context that is not wholly off point, Clark Byse recently looked back on "Fifty Years of Legal Education," and concluded: "Notwithstanding all the changes that have occurred, it seems to me that most American law schools are not fundamentally different from their 1935 predecessors." Byse, *Fifty Years of Legal Education*, 71 *IOWA L. REV.* 1063, 1086 (1986).

There is a large ingredient of truth in each implicit assertion that I have attributed to the law school experience. The distortion comes in the *partial* quality of that truth, and in the pyramiding of the assertions' mutually reinforcing effect. Taken as a whole, they systematically discourage students (and faculty as well) from inquiring into unspoken premises, whether about the legal system, the larger social order, or the role of lawyers; they inhibit the experience of choice, of human responsibility for the social constructs that we call the law and the legal profession; they are—among other, perhaps more serious vices—profoundly anti-intellectual.

Some teachers would subscribe to the implicit messages that I have described. Like that of the criminal procedure teacher quoted earlier, such avowals tend to be explicit in a most laconic way, articulated only when needed to be asserted, and then only as *ipse dixit*—as premises of lawyering, to be borne in mind in the admissions process—without acceptance of an obligation to engage respectfully with those who think otherwise. But a decent respect for the autonomy of others requires that the teacher make the avowal part of the explicit curriculum, and present it as a central and deeply controversial belief about justice and ethics—in short, as a political practice that one may insist that students engage with, but that one is not entitled to impose through pretended or real assertions that there are no alternative approaches to understanding or practicing law.

### III. AN ATTEMPTED ALTERNATIVE: THE CUNY PROGRAM

For one who shares my belief that the prevalent situation is seriously infirm, the question is whether it is worth attempting to conceive, articulate, and put into practice approaches that present to law students a fuller, more open sense of the social and political premises out of which the evolution of the substantive law, and the shaping of norms of practice, occur—that will expand, rather than atrophy, students' awareness of the centrality of choice, individual and societal, in law and lawyering. I spent six years carrying on such an attempt in connection with the founding of the City University of New York Law School at Queens College, and it may be useful to describe some aspects of the approach begun there to respond to the limitations of the implicit messages in the traditional curriculum.

In presenting this description, I am not recommending adoption of the whole or any aspect of the CUNY curriculum. Even if it had worked wonderfully at home—and of course the result was

something less than that—its exportability would be dubious, for many general and specific reasons. However, it is important for those law teachers who have enduring and significant dissatisfactions with prevailing patterns to explore ways of going beyond merely being dissatisfied. My hope is that the process of engaging with one specific set of alternatives will trigger constructive thoughts about ways in which other specific alternatives may come more fully into view.

#### A. *Premises, Purposes, and Structure*

For me, the major attraction and opportunity of the founding of a law school at the City University of New York lay in its apparent willingness to make a dual commitment: to make its educational premises and purposes explicit, and at the same time open to question; and to design an educational program responsive to its premises and purposes.<sup>35</sup> I begin therefore with a brief summary of our educational objectives as I came to understand them through the planning process.<sup>36</sup>

We sought to address four fundamental aspects of the learning environment:

1. To teach subject matter in ways that integrate, rather than dichotomize, different fields, in order to facilitate, rather than impede, the effort to articulate and draw in question the implicit premises and value choices underlying legal development;

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35. When I speak of “its” willingness, I do not mean to reify the participants in the experiment. The major actors who spoke for Queens College and the City University were interested, for several reasons, in establishing a law school that would be something other than “one more law school,” and the CUNY tradition of access to those less able to avail themselves of educational opportunities by reason of class- and race-related barriers combined with the CUNY interest in preparing graduates for careers oriented to public service to create a hospitable atmosphere. Charles R. Halpern, the founding Dean, was a long-time leader in the effort to devise methods of clinical education that equipped students to do high-quality public interest practice, and he was eager to pursue that effort in the context of a thoroughgoing reexamination and restructuring of law school curricular methods and content. I remain grateful to him for the discretion that I enjoyed as the person primarily responsible for the development of the educational program, and for the confidence in me that he manifested, often in the face of considerable grounds for doubt.

36. It should be borne in mind that, notwithstanding a genuine commitment to being explicit, the process of articulating premises and purposes is a challenging one, which probably cannot be—and, in any event, in this case was not—accomplished all at once, or fully at all. The process is necessarily a dynamic, developmental one, and even a retrospective statement of premises and purposes should be seen as work in progress.



2. To study legal development in the context of lawyering decision-making, in order to encourage students to see that law has significance only in reference to underlying human problems;

↳ 3. To study lawyering in the context of moral and political theory, and as an aspect of interpersonal communications, in order to encourage students to see their task as the mastery of skills that are not disembodied from questions of identity and values in their work;

4. To actualize students' capacity to be active, reflective learners, in order to create a teacher-student relation that is less role-defined and more empowering of students, so as to enhance, rather than impair, the capacity of students to adopt in their law practice a less role-defined, more empowering relation with their clients.

↳ Each of the foregoing sentences begins with a goal that is itself a premise or means with respect to a deeper purpose, expressed in the remainder of the sentence. But the "deeper purpose" too needs to be subjected to the same probing process. *Why* do we seek to open the values or perceptions underlying implicit premises; to view law as an input to the human relations that shape its application to people who are or might be clients; to view mastery of lawyering skills as imbedded in questions of professional identity, values, and goals; and to facilitate the restructuring of the prevalent patterns of teacher-student and attorney-client interaction?

The more general and more fundamental educational purpose that these goals all serve is to enable students to exercise *responsibility* in the practice of law. The core meaning of the idea of responsibility is recognizing that the choices one makes as a lawyer (like those one makes elsewhere in life) affect people's lives. From this recognition flows the realization that our work as lawyers can be an affirmation, or a negation, of our values, of the goals that we want our lives to strengthen. At CUNY, we sought to create an educational program that would actualize, rather than undermine, students' aspirations toward finding in a legal career a means of expressing their commitment to justice, fairness, and equality, and that would not encourage students to set aside any such values, nor channel them into replicating existing patterns of legal representation. We sought to do this by aiding students to develop their facility to reflect on what they read, on what they saw others do, and what they themselves did; to perceive and understand the choices and premises often implicit in the structure and work product of the legal system; and to exercise their critical judgment in assessing

their response to the world around them. Our aim was to encourage students to reflect on their life choices, their evolving concept of professionalism, and the content of the law itself, in ways that fostered their capacity to practice law in a societally useful manner.<sup>37</sup>

↳ In my view, the primary task of a law school is to help students explore the fuller meaning and implications of responsibility in law practice. The greater part of our teaching time, however, needs to be devoted to giving students some of what they need in order to be responsible. The law school curriculum should reflect the faculty's effort to give content to these tasks.

Knowledge of legal doctrine is of course a crucial part of what one needs to be responsible, as is skill at the basic lawyering tasks valued in the traditional curriculum: the ability to analyze and synthesize legal principles, a keen sense of relevance and procedure, and the ability to organize and present a coherent and persuasive line of reasoning in speech and writing. Traditional legal education tends to value this skill and knowledge in itself, and it becomes the goal rather than a means toward reaching the goal. As a result, the traditional curriculum often fails to recognize, or to act on the recognition, that a person needs far more than these traditionally-valued skills in order to be a responsible lawyer.

The "more" includes the wider range of skills associated with clinical teaching in the narrow sense, such as planning a litigation or other aspect of representation, interviewing and counseling clients and prospective clients, conducting a trial or hearing, and negotiating and drafting agreed-upon resolutions of actual or potential disputes. For this reason, the idea that all students should be required to do some "clinical work" is one whose normative merit needs to be fully acknowledged.

However, these traditional clinical skills do not sufficiently address the need. To practice responsibly, a lawyer must also have

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37. This "explanation," of course, only opens further questions to inquiry, questions both of clarification and of justification. I cannot pursue the question of purpose further here, however, without diverting myself entirely from looking at the ways in which the program sought to carry out its purposes.

A critical distinction to be borne in mind is that between teaching students that they *should* be responsible in their practice and *enabling* them to be responsible should they choose to do so—by teaching them something of the meaning of the idea of responsibility and something of what they need to know in order to be able to be responsible. I have elsewhere explored, albeit in a format that is still terse and fragmentary, my perception of the question of responsibility and values. See Lesnick, *The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law*, 10 NOVA L.J. 633, 633–35 (1986).

acquired several more qualitative skills, primarily those of listening, exercising judgment, and engaging in moral reasoning. Few law schools today seem to consider these skills as central aspects of clinical education.<sup>38</sup>

Still, however broadened the concept of "skill" may be, the need goes beyond what may be embraced by the term. The additional qualities central to the education of a responsible lawyer are as simple to state as they are difficult to expand upon, even in a summary fashion: a developing knowledge of oneself and a developing knowledge of the premises of the legal and social order. The former entails a commitment to experiential learning, feedback, and reflection as primary learning modes; the latter entails a commitment to a substantial integration of legal theory with doctrinal or "skills" study.

These are obviously demanding goals, very likely unreachable in full. But only when they have all been brought within our range of vision as genuine parts of the educational agenda is it time to begin the difficult work of triage; else we mask priority decisions as simple imperatives of time pressures.

The primary means by which we sought to pursue our objectives at CUNY was to restructure the work of students and teachers in several mutually reinforcing ways.

*First*, we attempted to alter students'—and teachers'—experience of the boundaries of a "subject." We taught contracts and property together, in a course called Law and a Market Economy. We separated (for the time being) a major portion of constitutional law from other areas normally included in that course, and studied it alongside related areas of nonconstitutional law, in a course that (to make the breadth of its concept of "law" explicit) bore the rather awkward title of Liberty, Equality, Due Process, in Historical and Philosophical Context. Finally, we introduced civil procedure in a broadened context, suggested by the title, Adjudication and Alternatives to Adjudication.

We sought to teach a legal "subject" not only as specific content to be learned, whether as black-letter rules or as the "policy" arguments for one result or another, but also as a process of human interaction, whose understanding requires the ability to see implicit premises and links with moral, social, and political theory.

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38. Cf. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 861 (1987) ("The truly distinguished lawyer, however, the one who is recognized by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill.").

*Second*, we added a first-semester course explicitly focused on lawyering issues. The course, called *The Work of a Lawyer*, embraced material often found in professional responsibility and lawyering process courses, as well as some material typically not taught in the classroom at all. By including this material in a format that was coordinate with others, we endeavored to attest to its centrality. By addressing questions of skill embedded in those of role, identity, and values, we attested to their interconnection and brought to the surface the consequences—and the premises—of attempting to learn “skills” alone.<sup>39</sup> We sought, in all of our work with students, to keep in the forefront of our attention questions regarding the social consequences of the choices made by lawyers and the law; consequences to adversaries, third parties, and the legal-political order itself were not reflexively deemed less significant than consequences to clients.

*Third*, believing that revisions in course content and design would not suffice to accomplish the stated purposes, we explicitly made *all* of the course work an input to the carrying out of simulated lawyering work. In what came to be called “Houses,” groups of approximately twenty students worked in association with a faculty member (a “House counselor”) who acted as a senior lawyer—one with the time and commitment to teach his or her juniors. More than half of a first-year student’s scheduled “class” week was to be work done in the Houses on the simulations.

We were explicit that, in using simulations as a teaching vehicle we were not simply adding the teaching of skills to that of knowledge, but were seeking to integrate both in a context that emphasized choice, responsibility for choice, and an awareness of purpose. Each task that students undertook in the simulations had a three-part structure—planning, doing, and reflection. We spent considerable effort seeking to overcome the tendency to over-emphasize the “doing” phase.<sup>40</sup>

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39. The tendency to equate clinical education with “skills” training has been, in my judgment, one of clinical education’s great failings—for which many clinicians share responsibility with other teachers, administrators, and practitioners. See the trenchant critique by David Barnhizer, *The Intellectual Contributions of Clinical Faculty: Facilitating Fundamental Change in the American Law Schools Through Aggressive Formulations of Models of Justice and Humanity* 5 (1989) (unpublished manuscript) (“Unless the intellectual dimensions of the law, justice, and law practice are carefully nurtured by clinical faculty, the clinical process can become anti-intellectual, rigidly self-contained, and suffocating.”).

40. I have set forth in an Appendix an excerpt from a memorandum prepared by Professor Vanessa Merton (now of the Pace University School of Law) that was distrib-



*Fourth*, we greatly altered the evaluation of student work. Except in the most extreme cases of nonfeasance, course work as such was not graded, in order to attest to our beliefs that knowledge “as such” is an inchoate value and that an examination, while in a sense an application of knowledge, typically cannot justifiably be termed a simulated lawyering experience. We based evaluation of student performance on the work done in the Houses, where knowledge and skill were to be integrated in an application to a lawyering task.

Beyond that, evaluation endeavored to address a range of qualities more closely comparable to those that are constitutive of excellent work in a lawyer.<sup>41</sup> We revised the indicia of quality to emphasize the process of doing lawyers’ work as well as the final product—and in particular to encourage students to use their House counselors as mentors—and we abjured entirely the averaging of grades from one semester to another, in favor of an avowedly developmental approach. Our aim here was to encourage students to take risks, to learn how to seek help, to learn in short how to become lifetime self-teachers. Our expectation was that these rather marked changes in the bases of grading would convey credibly to students a broadened concept of quality lawyering and of learning.<sup>42</sup>

While it is essential, in my judgment, to articulate goals and methods at a rather high level of generality, the effort takes on clarity and focus only in specific applications. I will therefore describe with some particularity the initial simulation, which provided the context for the opening month of a CUNY law student’s course of

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uted to students in the opening days of the first semester. We designed it to make explicit this structure, and its premises and purposes.

41. We evaluated student work in six areas, of which Legal Reasoning was but one. The others were Theoretical Perspective, Clinical Judgment, Professional Responsibility, Communication (embracing oral as well as written communication, and including listening as well as speaking or writing), and Management of Effort.

42. Our approach to admissions reinforced these curricular efforts. If we were to assert our belief that quality legal work is not wholly defined by rigorous analytical reasoning, and that the social consequences of our professional choices are matters for which we should accept responsibility, we could not simply replicate the traditional criteria of “merit” in law school admissions. We scaled down sharply the weight given to LSAT scores, and in general used the indicia of academic ability more as an absolute criterion of admissibility than as a basis for choosing among academically qualified people. We sought to develop methods of strengthening our capacity, in making relative judgments, to look to some of the less tangible qualities that make an outstanding lawyer: judgment, initiative, empathy, interpersonal competence, and the ability to work collaboratively as well as independently. We believed that these criteria, valid in their own right, would also help us obtain a student body that was diverse in its cultural, ethnic, racial, and “economic” composition.

study. In light of what I have asserted initially about the “imprinting” power of a student’s early experience, it seems appropriate to devote special attention to that very special moment.

### B. *Crystallization: The Mussel Bay Simulation*

We designed an opening simulation that was factually simple, but that would capture as full a range of the foregoing purposes as possible; if only once, we meant to show our students “the world in a grain of sand.” The simulation, which ran for approximately one month, concerned a small group of people who work together as a theater group and who had recently rented a theater in “Mussel Bay,” a suburban community.<sup>43</sup> They are interested in buying a house in the community, have found one that is to their liking, and have reached agreement on contract terms with the seller. The broker learns that a local ordinance and a deed restriction may each prohibit ownership or occupancy by unrelated adults. Two of the group are a couple, not married; the buyers have said that they want to take title in all of their names. The seller is under some time pressure to find a willing buyer. A neighbor is threatening adverse action.

We asked each student to act as a junior lawyer in a small firm consulted by either the buyers or the seller, and to act as the client in the opposite setting. The simulation took the problem only through the early stages of representation: an initial interview of a prospective client, the decision to undertake the representation, counseling the client regarding options, and an initial choice of options by the client.

We assigned students a large number of specific tasks in the simulation. *In role*, they conducted an initial interview of a prospective client; prepared a memorandum to the firm on the case, with a description of the client’s goals and priorities and a recommendation whether to undertake the representation; prepared a memorandum to the firm on the legal issues presented, with an analysis of the options, followed by a letter to the client outlining options;<sup>44</sup> conducted a counseling interview with the client; and (as

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43. The description that follows does not accord completely with any single year’s version of what we asked students to do. Each year, we introduced some changes in the setting and tasks.

44. The options that students most often perceived were: to seek another house or buyer; to go through with the sale and purchase despite the risk; to seek a waiver, variance, or exemption from the local body that enforces the ordinance; to seek an accommodation with the neighbor or with the relevant local officials; or to bring suit in

client) made a decision among the options.<sup>45</sup> *Out of role*, students wrote memoranda reflecting on each lawyer-client meeting; received feedback from their clients on each meeting and on the client letter, in one-on-one meetings and in group sessions in which the House counselors participated; and prepared feedback agendas in preparation for the feedback meetings.

Students met with their House counselor and small groups of colleagues to plan each step in the process. In that connection, they generated information needs, including needs for knowledge of the law, which were responded to in course sessions, to some extent in supplementary sessions in House, and to some extent in student individual and group work.

We designed the problem to draw on all of the fall semester courses, which followed a syllabus that enabled students to address relevant aspects of the simulation as the House work progressed:

(a) From *Law and a Market Economy*: ownership as the power to exclude; covenants running with the land, as a link between contracts and property; the interplay between facilitative and regulatory approaches to private ordering with respect to land;

(b) From *Liberty, Equality, Due Process*: eighteenth and twentieth century perceptions of property as an ingredient of, and as a threat to, personal liberty; private and public restrictions on land use as protecting, and as impairing, freedom of association; the Constitution as higher law;

(c) From *Adjudication and Alternatives to Adjudication*: formal and informal methods of processing disputes; the structure and value bases of adjudication and of negotiated and mediated processes; the phases of a lawsuit; the federal system of courts and law-making;

(d) From *The Work of a Lawyer*: accurate listening, and accurate identification of client priorities and objectives, as lawyering skills; introduction to interviewing and counseling skills; the decision whether to undertake a representation; lawyer and client roles in the counseling setting, including the place of the lawyer's priorities and objectives; authority and autonomy within a firm, and

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state or federal court, seeking to establish the inapplicability or unenforceability of the restrictive covenant and ordinance.

45. Once, we ended the simulation by having the students, in role as lawyers, meet briefly in groups defined by the choice among the options made by the student who played their client. This was done to bring home to them how dramatically a client's choice may affect the task facing a lawyer, and thereby to supply a powerful experiential context for discussion of issues of client autonomy and professional expertise.

within the profession; introduction to the structure, content, and status of the ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct.

It is useful to look back over the ways in which the Mussel Bay simulation was intended to further concretely a number of the School's educational objectives. To do so makes manifest the richness of the simulation method and the interrelation of educational objectives.

1. The problem presents "the law" as something that lawyers need to learn in order to carry on their work, rather than as something that students need to learn in order to be tested, ranked, and certified.

2. It presents the study of law through a number of subjects that, though divided from one another for some teaching purposes, students perceive as connected parts of a single whole.

3. By beginning on the second day of law school and having the students participate actively from the next day, the problem places the students in an active stance—talking, meeting, and writing—at the very outset. By the end of the first month, students have done three pieces of writing in role, and four or five out of role, had two interviews as lawyers and two as clients, and made important decisions in three different contexts.

4. The problem allows the planning and reflection/feedback stages to be carried on through group as well as individual work, so that students learn to work collaboratively as well as individually, and learn that they can learn from one another as well as from the faculty.

5. The problem illustrates how legal doctrine grows out of human responses to human problems, and tends to become a structure that loses its connection with that source.

6. It intertwines private and public law issues and allows so-called private areas, such as enforcement of contracts (including those seeking to create rights and duties in third parties) and the right of property owners to exclude, easily to be seen as embedded in state regulation.

7. The problem is one in which, although the merits of any lawsuit are relevant, adjudicatory responses are clearly of limited responsiveness to the clients' needs—the seller needs a prompt, inexpensive solution; the buyers need a prompt solution that will not alienate the community.



8. The problem introduces students immediately to the lawyering skills of interviewing and counseling, and thereby attests to their centrality as aspects of quality work as a lawyer. It does so, however, in a context that emphasizes the critical part that listening, exercising judgment, and addressing questions of client autonomy and professionalism play in the mastery of those skills. This process is aided by placing the students in the role of client as well as lawyer.

9. The problem raises the question of what it means to practice in a private, fee-generating setting with an orientation to the public interest, and how "political" concerns—the impact and legitimacy of restrictions on private living arrangements—can and should interact with counseling and representational choices.

10. The problem introduces students to the skill of "legal writing" in a context in which:

- a) students see writing in a legal setting not wholly separate from writing generally;
- b) students see writing as not reflexively more important than other interpersonal skills;
- c) legal writing is not over-identified with advocacy;
- d) the traditional writing skills of clarity and coherence are valued, but in a setting that asks the writer to keep the intended reader, and other aspects of the context, clearly in mind, and that makes it plain that reader and context are situation-specific.

11. The problem has no clearly satisfactory response, and introduces students to the skill of exercising clinical judgment.<sup>46</sup>

#### IV. CONCLUSION/BEGINNINGS

I imagine that it is clearer to most readers than it was to me eight years ago that, although one may wisely aspire to envision infinity in a grain of sand, it is in the nature of infinity that it cannot be captured on a canvas and sketched out to be apprehended and absorbed. The very holism of the CUNY design was its greatest flaw: even if a faculty could be found that was willing to adopt so

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46. Of course, far more is required than a suitable problem if an educational program is to create an atmosphere hospitable to learning to exercise judgment. A good educational program must emphasize openness to reflection and feedback, and learning from experience, as central aspects of that skill. In order to facilitate the strengthening of *that* quality, it must emphasize learner-directed feedback, the subordination of evaluation to feedback, and a developmental approach to mastery and evaluation. These elements were central aspects of the CUNY concept, although they are only suggested in the descriptions above.

integrated and comprehensive a design, with the degree of rejection of division of labor that it entailed, the design would inevitably prove too partial and fragmentary. A grain of sand is not capable of providing neophyte lawyers with a sufficiently *layered* experience, and a three-year's succession of Mussel Bays was simply beyond us, faculty and students alike.

Perhaps I am simply making a virtue out of necessity, but I find a fair amount of cheer in this conclusion. For the real question is not what "legal education" will do in response to the critique I have offered in this essay. The answer to that is clear: legal education will go on as it has, changing ever-so-slowly, sometimes but not always for the better, while rejecting, deflecting, and absorbing criticism. The real question is what those law teachers who find significant merit in a particular critique can and will do in response to shape their own teaching.

In that context, it seems to me that the pursuit, in a more traditional setting, of but one or a few of the goals or methods that went to make up the overall CUNY concept may be a more useful undertaking than I was willing to concede eight years ago. Each of us as an individual contributes, no matter what our views and actions, no more than a grain (or two) of sand to the evolution of the law and its practice; the clarity with which we each undertake that work can be greatly aided by grounding it, if not in infinity, in a set of premises and purposes that is the product of our own reflection.

A critical failing of legal education is that it is structured to discourage rather than encourage such searching. The emphasis on scholarship as compared to teaching, and on the study and teaching of law as compared to that of lawyering, is an aspect of this structure, for it tends to produce a faculty whose primary interest is in bringing to bear its considerable intellectual resources on thinking about legal regulation, and much less on grappling with the processes of becoming and being a lawyer. Another structural factor is the way that law school curricula tend to be built as amalgams of individual preferences, rather than through the assumption of responsibility for the shape of the whole by any person or institution, whether dean, committee, or faculty.<sup>47</sup>

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47. On both of these aspects, the following casual justificatory description of law faculties by a President of the Association of American Law Schools is revealing:

The chief loyalty of the faculty may be to their various disciplines rather than to the dean or the school—and, if the faculty is to have the scope to develop its own intellectual interests in productive ways that redound to the luster of the institution, such a priority cannot be condemned.

But discouragement is not prohibition. It is open to us as individual teachers to be aware of and resist the tendency generated by prevailing structures, and such resistance does not require changing the structures themselves. It is no more necessary than it is possible for an individual teacher, or a group of individuals, to undo the major structures that shape legal education. What may be possible is for those who see the importance of doing so to restructure their own teaching in ways that will help them to make students aware of the implicit premises of the legal and social order, including the educational venture in which they are participating, and to explore the functions and limits of those premises, and their implications for students' work as lawyers. Responsible lawyering at bottom calls upon one to struggle to be aware of what choices one does have and of what lies beyond choice.<sup>48</sup> We as teachers model such responsibility when we carry on that effort with regard to the evolution of our own teaching.

It matters less whether you find the particular vision that animated the CUNY experiment a source of insight than whether you seek to discern a set of premises and purposes that gives focus and direction to the evolution of your own teaching. Alone if necessary, in collaboration with one or more colleagues if possible,<sup>49</sup> there is much each of us can accomplish to make our pedagogy more fully expressive of our perception of the world of law and lawyering.

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Kay, *President's Message Nurturing Deans*, A. AM. L. SCHS. NEWSL., Sept. 1989, at 4.

48. Warren Lehman has written insightfully of this concept:

There is the problem. I do not think I like what this client wants to do, but I would feel very uncomfortable raising the issue. What, then, do I as a lawyer do? Here is the difficult answer: I admit to myself that I cannot talk to a particular client who is off-putting or overwhelming or cocksure, and that I would probably be a better person and lawyer if I could. This seems costly because it requires first that I take the trouble to discover in each case what I ought to do, and second that I recognize that, like every other human being, I cannot do everything. Neither the introspection nor the confession is comfortable. It is no wonder we are tempted to avoid them.

Lehman, *supra* note 26, at 1082-83.

49. A number of schools, no more hospitable than most to significant institutional modifications in their educational program, appear to be more hospitable to the idea of authorizing a faculty group to develop experimental enclaves, in some cases even for the first year curriculum.

## APPENDIX

THE WORK OF A CUNY LAW STUDENT:  
SIMULATION AND THE EXPERIENTIAL LEARNING PROCESS<sup>50</sup>

By Vanessa Merton

[T]he work you do as part of a simulation is selectively, but not exactly, the same as what you would do as a lawyer confronted with a comparable problem. By drastically shortening the time frame of the actual process, the simulation allows you to experience the consequences of your choices relatively quickly. In a simulation, you are asked to assume certain roles, and to engage in a variety of tasks, some in-role and some out-of-role (except for the ubiquitous role of "law student"). The generic set of tasks you are asked to engage in are:

- 1) planning—identifying your purpose, your options, and making some deliberate choices;
- 2) doing—carrying out the plan you develop, making the adjustments that seem required in light of your underlying purpose;
- 3) reflecting—seeking to understand what happened, why it happened, and what and how you are learning about lawyering and yourself as a lawyer.

Then the process starts over, with trying the same or similar task again, keeping in mind what you learned from what you did the first time. That is the essence of experiential learning, which we will ask you to do again and again and what lawyers who are willing to learn from their experience do throughout their careers.

This sequence is the unifying pattern of the many stages of this and future simulations. Each stage is important, but we want to place special emphasis on the planning and reflecting phases of the work we engage in. We do not expect you to, and hope that you will not try to, achieve perfection in your performance of lawyering tasks the first time out—or the second, or the fifteenth. Through the simulation, we do hope that you will be able to develop the self-reflective approach to work that will enable you to continue to learn from the chaotic, largely unstructured, uncontrolled experience of being a lawyer.

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50. This memorandum was prepared by Professor Merton for distribution to entering CUNY law students and is on file at the UCLA Law Review office. *See supra* note 40 and accompanying text.



We believe that the simulation method offers certain advantages over the two models of legal education that preceded it. One model, the apprenticeship model that prevailed until the last quarter of the last century, involved the supervision of a *working* lawyer. The other model, sometimes called the Langdellian or case method . . . has come to mean reading lots of appellate opinions and in large lecture-type classes discussing the legal principles they illustrate. The focus under the first system was very strongly on *doing*, learning in almost a rote method by following very carefully the *rules* or techniques that a supervising lawyer used in his—and then it *was his*—work, with little attention to the apprentice's developing a sense of generalizable principles or legal theory. The emphasis in the second model, to some extent in reaction to the first, was on *thinking*, with very little attention to learning how to apply in practice the theory and concepts that were discussed in the class, and no attention at all to the possible disparities between, for example, the facts that the judges writing the appellate opinions chose to include and those that may have actually existed.

Our curriculum incorporates substantial elements of both these models, and seeks to integrate their strengths and minimize their shortcomings. . . .

. . . .

In that connection, lawyers need to learn to take calculated risks. A theme we will return to again and again is the impossibility of achieving perfection in professional work. No matter how carefully we plan, however talented and knowledgeable we are, we will always make mistakes. What simulation offers is the chance to make those mistakes in a protected environment in which the consequences of the mistake is not that a client is injured or a cause is lost, but rather that you learn something about the law and lawyering. Since learning is the goal, the "mistake" or "failure" is translated into success. This is not to suggest that you set out to make mistakes; just that the inevitable mistakes have a different meaning in the simulation context.

Ours is a self-reflective approach to the lawyer's role. We do not want to teach in a way that students simply accept the traditional role axiomatically. We want students to have greater choice about how to integrate who they are as persons with what kind of lawyers they want to be. That is no easy task. Learning to fashion a lawyer's role that expresses who you are and is responsive to the needs of others requires continual reflection on the choices we tend to make reflexively and on the other options available. It requires

attention not only to what we are doing but to who we are becoming. That task, a central part of the mission of this law school, cannot be approached abstractly. It requires doing and reflecting and learning from doing. The simulation mode is ideal for that end.